SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 472.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PROSECUTOR,

vs.

ALFRED H. SMITH, RESPONDENT.

MOTION TO AFFIRM THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND OR IN LIEU THEREOF TO ORDER THE CAUSE PLACED ON THE SUMMARY DOCKET

and

BRIEF IN SUPPORT THEREOF.

T. ALAN GOLDSBOROUGH,
Attorney for Respondent.

(26,548)

Supreme Court of the United States.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Prosecutor
vs.
ALFRED H. SMITH, Respondent.

Motion to affirm the judgment of the Court of Appeals of Maryland or in lieu thereof to order the cause placed on the summary docket.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The respondent, Alfred H. Smith, moves the Court to affirm the judgment of the Court of Appeals of Maryor in lieu thereof to place this cause on the summary docket for the month of March, 1919. This cause comes into this Court on a writ of certiorari granted on the 21st day of October, 1918.

The sole question involved is whether or not the respondent was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act at the time he received the injuries which resulted in this suit. The motion is based on the following reasoning;

1. The instant case is that of a man (the respondent) cooking a meal for workmen repairing a bridge over which run trains engaged in interstate commerce and whose contract with the railroad requires him to cook that meal in one of its cars located on the line of the railroad at the nearest point possible to the place where the bridge workers are engaged so as to facilitate the work, and who while cooking the meal, was injured by the negligence of a fellow servant engaged in interstate commerce.

2. That there is no qualitative and probably no quantitative difference between the instant case and the following;

(a) A man cooking a meal in the kitchen of a dining car for the comfort of an interstate passenger on an

interstate train (a dining car on an interstate train is engaged in interstate commerce, Johnson vs. So. Pac. Co. 196 U. S. 1, 21; 49 L. Ed. 361, 371;if a dining car, attached to an interstate train, is engaged in interstate commerce, then clearly a waiter or cook on a dining car, being the employees, the performance of whose duties make it possible for the dining car to perform the only function which it is to perform, is engaged in interstate commerce).

(b) A man cooking a meal in the caboose of an interstate freight train for the conductor and brakemen of the train in order to feed them on the run and thus facilitate the movement of interstate freight.

(c) A bridge worker engaged in repairing a bridge over which run trains engaged in interstate commerce, under contract to cook his meals, while on duty, on a car of his employer located on its tracks at a point as near as possible to the bridge work, in order to facilitate the quick return of the worker to the bridge being repaired, and injured while cooking his meal, by the negligence of a fellow servant engaged in interstate commerce.

(d) A man acting as a pullman porter on an interstate run, this being essentially domestic service.

Oliver vs. N. P. R. Co. 196 Fed. 432.
Robinson vs. B. & O. R. Co. 237 U. S. 84, 59 L. Ed. 849.

(e) A man acting as an operator of a railroad pumping plant which furnishes water for interstate engines.

Horton, etc. vs. Oregon W. R. & Nav. Co. 72 Wash. 503, 132 P. 897, 47 L. R. A. (N. S.) 8.

(Citated with approval in Pederson vs. Del. L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 1128).

The operator in the Horton case was riding from his home to his work on a hand car furnished by the railroad for that purpose.

(f) A man going after a drinking cup for the use of the engine crew on an interstate trip.

B. & O. R. R. Co. vs. Whitacre, 124 Md. 411, 427 (affirmed in 242 U. S. 169, 61 L. Ed. 228).

(g) The reasoning of various cases cited in respondent's brief filed with this motion, in which the employees were held to be engaged in interstate commerce.

And with special reference to that part of the motion asking that the case be placed on the Summary Docket, this respondent says that he is seventy years old, and that more than three years have intervened since he was injured on December 23rd, 1915, since which time he has been unable to work, and except for the help of his neighbors has been in practically destitute circumstances, that his general health is bad and that should he die before the final determination of this case by this Honorable Court, he and those dependent upon him will, in case it should be found that the respondent was not engaged in interstate commerce, be deprived of the benefit of the Workmen's Compensation law of the State of Maryland.

Respectfully submitted,

T. ALAN GOLDSBOROUGH,

Attorney for Respondent.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Prosecutor, vs. ALFRED H. SMITH, Respondent.	IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1918.

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO AFFIRM THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND OR IN LIEU THEREOF TO ORDER THE CAUSE PLACED ON THE SUMMARY DOCKET.

FACTS BEARING UPON THE RELATION OF THE RESPONDENT TO INTERSTATE COMMERCE.

The prosecutor is a common carrier with a main line from Philadelphia, Pennsylvania, to Cape Charles, Virginia, running through the States of Pennsylvania, Delaware, Maryland and Virginia. It has a branch line known as the Oxford Branch, running from Clayton, Delaware, to Oxford, Maryland, a distance of fifty-four miles. Fifteen miles of the road is in Delaware, and the remainder, some thirty-nine miles, in Maryland. Easton is a station in Maryland on the Oxford Branch. The respondent was employed by the prosecutor as a carpenter laborer and was engaged with a gang of bridge carpenters who worked all over the lines in the different States wherever bridges or bridge abutments needed repair, over which ran the prosecutor's trains.

Record, page 50-51-52-53

"Q. What was his employment during the length of time? A. He was a carpenter laborer but ('before' in the record by mistake) he done the cooking.

Q. He did cook? A. Yes, sir.

Mr. Goldsborough:

Q. He was employed as a carpenter laborer? A. Yes, sir. That's the way we have them on our roll.

Mr. Lewis:

Q. So there may be no misunderstanding, what is a carpenter laborer? A. He's a man that does labor work; works with the carpenters. The rate of his pay causes him to be rated as a laborer; a low rate of pay.

Q. Do you mean he worked as a carpenter? A. No, sir; he worked with them.

Q. But not as a carpenter. A. "No, sir."

Record page 54+55

"Cross Examination by Mr. Goldsborough.

Q. Mr. Larrimore, in speaking of bridge laborers, as I understand your testimony he was a bridge laborer or an assistant to bridge carpenters? A. No, he's a man unskilled in carpentering. The reason he is called a laborer is on account of the rate of pay he receives. We place them on the roll as carpenter laborers. That means they work with the carpenters.

Q. That means he worked with the carpenters? A. Yes, in that respect; he never was engaged in the work.

Q. He never was a carpenter? A. No, sir.

Q. The carpenters he was engaged to work with were bridge carpenters? A. We're called bridge carpenters, but our gang done principally bridge work.

Q. As I understand you it was principally bridge work your gang did? A. Yes, sir.

Q. Those were bridges over which trains run between the states of Maryland and Delaware? A. Yes, sir."

A car in which the gang ate, slept, and lived went back and forth between the States with the bridge gang. On the twenty-third of December, 1915, the car, generally called a camp car, was on a siding below Easton, the gang being engaged in repairing bridge abutments on a bridge below Easton over which ran the interstate passenger and freight trains of the prosecutor. As indicated above, these trains were *all either trains which were going from the State of Maryland into the State of Delaware or had come from the State of Delaware into the State of Maryland.* The duties of the respondent and those in which he had been engaged along with the

bridge gang for nearly twenty-seven years (Record page 78).

("Q. At the time of your injury at Easton how long had you been in the service of the company? A. Twenty-six years, six months and three days.

Q. You were sixty-seven—sixty-eight at he time of the injury? A.—I was in my 68th.

Q. You would be pensioned at seventy wouldn't you? A. Yes, sir.")

were principally to take care of the camp car, to keep it clean, attend to the beds, and prepare and cook the meals for the gang, including himself. The men, including the respondent, and the boss of the gang, who was also the respondent's boss, bought their food together, the camp car, as above indicated, being the place indicated by the prosecutor in which the respondent should perform his duties. On the above date a freight train on its run from Oxford to Clayton carrying interstate freight, stopped at Easton to pick up a freight car being loaded at the Easton Commission Company's warehouse. The engineer, with the engine and tender, went into the warehouse siding, pulled out the car, pulled the car on the main track and then made what is called a flying switch, that is, gave the car ahead of the engine impetus so that it would go back and couple with the balance of the freight train while the engine itself cut loose and went back on the siding on which was located the camp car. The engineer knew the camp car was on the siding and its location, which was one hundred and fifty-four feet back from what is known as the "clear" of the switch. The record discloses that the engineer negligently ran the engine with great violence against the car to which the camp car was coupled, partly demolishing one end of it. The collision caused the cars, of which the camp car was one, to move south, when they ran into other cars. The plaintiff describes the accident as follows (Record page 17):

"Q. Now Mr. Smith, what were you doing on the

23rd day of December, 1913? A. I was getting dinner. I was cooking a big turkey, and a freight came along between eight and nine o'clock. They always gave me warning before when they were coming in on that track. I had been to the stove to baste the turkey. I had two kettles of boiling water for the potatoes I just started after them when they struck me. I was knocked about ten feet and bruised my chin.

The witness continuing further states: "When they struck the other two cars before I could recover they knocked me over a chair and my shoulder struck here (indicating). I had no use of my shoulder since. If I have to 'bust' any wood I have to put the axe here (Indicating) I can't cut wood. My whole dependence is on the R. R. Co., with a sister and niece."

ARGUMENT

1.

(a) The respondent was performing his regular duties for a common carrier engaged in interstate commerce.

(b) His regular duties required his presence in a car located on tracks devoted exclusively to the passage of trains engaged in interstate commerce, and at the nearest possible point to the place where the bridge carpenters were engaged, so as to facilitate the work.

(c) The place designated by the prosecutor for the appellee to work made his employment come within the class known as "hazardous."

> "In the case of clerks in the accounting department, although they be engaged in keeping the accounts of interstate shipments, it is difficult to see how they are engaged in interstate commerce as used in this statute, for their work is not of a hazardous character, such as it seems that Congress had in mind when it enacted this statute. And this is also true of ticket sellers; but not station agents when handling interstate traffic."

Thornton, Federal, and Safety Appliance Acts (1916) P. 94.

(d) The place assigned to the respondent by the prosecutor for the performance of his duties was such as to render him constantly liable to injury by interstate trains and, as a matter of fact, he was injured by an interstate train, which are very significant facts;

(Lamphere vs. Oregon R. & Nav. Co. 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1. On page 2 the Court says:

> "He was on the premises of the railroad company and in the discharge of his duties when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company."

In Horton vs. Oregon-Wash. R. & Nav. Co., 72 Wash., 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8:

> "An operator of a railroad pumping plant which furnishes water for interstate and intrastate engines is employed in interstate commerce while riding from his home to his work on a hand car furnished by the company for that purpose, so as to be within the operation of the Federal Employer's Liability Act if injured by those, during that time, in charge of an interstate train."

In Central R. Co. vs. Colasurdo 113 C. C. A. 379, 192 Fed. 901, the Court said:

> "The car which struck the plaintiff was employed in interstate commerce."

Zikos vs. R. & Nav. Co. (C. C.) 179 Fed. 893.) for while it is not necessary that the servant whose negligence caused the injury, shall be engaged in interstate commerce,

> (Pederson vs. Del., L. & W. R. Co., 229 U. S., 146, 151, 57 L. Ed. 1125, 1127.)

a most diligent search has failed to reveal a single instance where an employee, in the performance of his du-

ties, which duties required his presence on the tracks of an interstate road, was injured through the negligence of a fellow servant, by a train of his employer engaged in interstate commerce, was not unhesitatingly held to have been engaged in interstate commerce.

(e) The respondent was engaged by the prosecutor as a part of the bridge gang and designated as a car-carpenter's helper and had a common boss with the rest of the men.

(f) The respondent's duties were as necessary to interstate commerce as the work of the rest of the gang, the division of labor being simply a matter of economic expediency.

(g) The bridge carpenters, with whom the respondent worked and for whom he was cooking dinner at the time of the accident, were engaged in interstate commerce.

Pederson vs. Del. L. & W. R. R. Co. supra, 229 U. S. 146, 57 L. Ed. 1125.
Lombardo vs. Boston, etc., R. Co. 223 Fed. 427.
Hardwich vs. Wabash R. Co. 181 Mo. A. 156, 168 S. W. 328.
San Pedro L. A. & S. L. R. Co. vs. Davide, 210 Fed. 870, 127 C. C. A. 454.
12 C. J. 47.
Note to Seaboard A. L. Co. vs. Horton, 1915 C. (L. R. A.) 1, 62.

2.

Scope of The Act.

The tendency of the Courts is to construe the statute liberally as being remedial in character, although it is in derogation of the common law.

Annotation to Seaboard A. L. R. Co. vs. Horton (L. R. A.) 1915 C, 1, 48.

"Congress may legislate about the agents and instruments of interstate commerce, and about the condi-

tions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair Legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

2nd Employer's Liability Cases.
(Mondou vs. N. Y., N. H. & Hartford R. Co.)
223 U. S. 6.
56 L. Ed. 329.
38 L. R. A. (N. S.) 44, 53.

Quoting from a case cited with approval by the Supreme Court of the United States in Pederson vs. Del. L. & W. R. Co., 229 U. S. 146, 153, 57 L. Ed. 1125, 1128:

"The sole question presented for our consideration is this: Was the decedent employed by the defendant in interstate commerce at the time of his death, so as to enable his representative to invoke the benefit of this act? The earlier act of 1906 (act June 11, 1906, Chap. 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316) was in the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141, held unconstitutional as exceeding the power of Congress under the commerce clause of the Constitution, in that it imposed a liability, as against all common carriers engaged in interstate commerce, in favor of any of their employees without restriction, and whether their employment did or did not pertain to interstate commerce. In those cases, however, all the justices concurred in recognizing the power of Congress to regulate the relation of master and servant by regulations confined to interstate commerce and services connected therewith. The act of 1908, above quoted, was passed to conform to that decision, and should therefore be construed as including within the term 'any person suffering injury while he is employed by such carrier in such commerce', *every person who could be so included within the purview of the constitutional power. The 'act meant to include everybody whom Congress could include.'* Colasurdo v. Central R. Co. (C. C.) 180 Fed. 832.

That such was the purpose and intent of the second act seems to be assumed by the Supreme Court of the United States in an opinion holding the act constitutional. Second Employers' Liability cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. The inquiry is thus narrowed to the concrete question: *Had Congress the constitutional power to enact a law regulating the relation between a common carrier engaged in interstate commerce and its servant who is employed in pumping water used by its engines both for interstate and intrastate commerce? If Congress had this power, then we must assume that it intended to exercise it in passing the present act.*" (Italics mine.)

Horton vs. Oregon-Wash. R. & Nav. Co., 72 Wash., 503, 132 P. 897, 47 L. R. A. (N. S.) 8, 10.

3

The case at bar seems to parallel in principle the following cases decided by the Supreme Court of the United States in which the employee was held to be engaged in interstate commerce.

In the Pederson case, supra, on page 1128 of the L. Ed. The Supreme Court says:

"The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. *In other words it was a minor task which was essentially a part of the larger one, as in the case when an engineer takes his engine from the round-house to the track on which are the cars he is to haul in interstate commerce.* See Lamphere vs. Oregon R. & Nav. Co.—L. R. A. (N. S.)—, 116 C. C. A. 156, 196 Fed. 336; Horton vs. Oregon—Washington R. & Nav. Co. 72 Wash. 503,

130 Pac. 897; Johnson vs. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158." (Italics mine.)

In St. Louis S. F. & T. R. Co. vs. Seale, 229 U. S. 156, 159, 160; 57 L. Ed. 1129, 1134, the court states the facts as follows:

> "The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductors' lists, and of putting cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing trains. His duties related to both intrastate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein to meet an incoming freight train from Madill, Oklahoma, composed of several cars, ten of which were loaded with freight. The purpose with which he was going to the train was that of taking the numbers of the cars and otherwise performing his duties in respect of them. While so engaged he was struck and fatally injured by a switch engine which, it is claimed, was being negligently operated by other employees in the yard."

From the case of N. C. Rrd. Co. vs. Zachary, 232 U. S. 248, 260, 58 L. Ed. 591, 596, Ann. Cas. 1914 C., 159;

> "It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in futuro. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See Pederson vs. Delaware, L. & W.

R. Co. 229 U. S. 146, 151, 57 L. Ed. 1125, 1127, 33 Sup. Ct. Rep. 648; St. Louis, S. F. & T. R. Co. vs. Seale 229 U. S. 156, 161, 57 L. Ed. 1129, 1134, 33 Sup. Ct. Rep. 651.

Again it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, *and that he had not gone beyond the limits of the railroad yard when he was struck.* There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See Missouri, K. & T. R. Co. vs. United States, 231 U. S. 112, 119, ante, 144, 147, 34 Sup. Ct. Rep. 26." (Italics mine.)

A brakeman of a freight train, that was being prepared to engage in interstate commerce, who left the train and went across the railroad yard for a drinking cup, for the engine crew on the trip, is engaged in interstate commerce within the meaning of the Act.

"In the N. C. R. R. Co. vs. Zachary, 232 U. S. 248, it was held that the acts of an employee in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling-up of the interstate cars, are acts done while engaged in interstate commerce. In this latter case the party for whose death the action was brought was a fireman on a locomotive of the Southern Railway, he had prepared his engine for the trip and was crossing the railroad yard from his engine to go to his boarding-house; and had passed behind one locomotive, when he was run down by a switching engine on an adjoining track. Certainly the act of the

fireman in going to his boarding-house was no more an act connected with interstate commerce than was the act of Whitacre in hunting for a tool boy in order to obtain a tin cup for the use of the crew on its trip."

B. & O. R. R. Co. vs. Whitacre, 124, Md. 411, 427. (Affirmed in 242 U. S. 169, 61 L. Ed. 228.)

In Erie R. Co. vs. Winfield, 244 U. S. 170, 173, 61 L. Ed. 1057, 1065; the Court said:

"The second question (was plaintiff engaged in interstate commerce) must be given an affirmative answer. *In leaving the carrier's yard* at the close of his day's work the deceased was but discharging a duty of his employment. See North Carolina R. Co. vs. Zachary, 232 U. S. 248, 260, 58 L. Ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914 C. 159. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was not more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was *leaving the yard at the time of the injury*, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes, of no importance." (Italics mine.)

In N. Y. Cent. & H. R. R. Co. vs. Carr, 238 U. S. 260, 59 L. Ed. 1298, 1299, 1300, the plaintiff was a brakeman on a "pick-up" train running between points in the same State, but containing some cars loaded with interstate freight; he was injured while atempting, in the course of his employment, to set the brakes of an intrastate car, which had been cut out of the train and backed into a siding. The Court says:

"The railroad company insists that when the two cars were cut out of the train and backed into a siding, they lost their interstate character, so that Carr

while working thereon was engaged in intrastate commerce and not entitled to recover under the Federal employers' liability act. The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that during the same day, railroad employees often and rapidly pass, from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from the interstate business. The present case is an instance of that kind; and many arguments have been advanced by the railway company to support its contention that, as those two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. St. Louis, S. F. & T. R. Co. vs. Seale, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914 C., 156; North Carolina R. Co. vs. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cass. 1914 C., 159. This case is within the principle of those two decisions.

The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train, and proceed with it, with Carr and the other interstate employ-

ees, on its interstate journey.

The case is entirely different from that of Illinois C. R. Co. vs. Behrens, 233 U. S. 473, 58 L. Ed., 1051, 34 Sup. Ct. Rep. 646,Ann. Cas.1914 C., 163, for there the train of empty cars was running between two points in the same state. The fact that they might soon thereafter be used in interstate business did not affect their intrastate status at the time of the injury; for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles, the effect would be to give every car on the line that character.

Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury, and the judgment in his favor must be affirmed."

In Louisville & Nashville R. Co. vs. Parker, 242 U. S. 13, 14, 15, 61 L. Ed. 119, 120, 121:

"The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. *This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate.* The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in Illinois C. R. Co. vs. Behrens, 233 U. S. 473, 478, 58 L. Ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C., 163,

10 N. C. C. A. 153, and doing the act for the purpose of furthering the later work. See New York C. & H. R. R. Co. vs. Carr, 233 U. S. 260, 263, 59 L. Ed. 1298, 35 Sup. Rep. 780, 9 N. C. C. A. 1; Pennsylvania Co. V. Donat, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. Rep. 4; Kalem Co. vs. Harper Bros, 222 U. S. 55, 62, 63, 56 L. Ed. 92, 95, 96, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913 A., 1285." (Italics mine.)

In a late case decided by the Supreme Court of the United States, the plaintiff was a car inspector in the defendant's yards, a collission occurred, a fellow servant was pinned under a car, and in obedience to the printed rules of the company, and also orders of a superior employee, the plaintiff went to get a jack to assist in raising the wrecked car so as to extricate O'Berry (the fellow servant) and clear the tracks of the wreckage; while on his way he stumbled over some clinkers and crossties, fell, and was seriously injured. The Court said:

> The Court (a lower Court) held that although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.
>
> We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by Pederson vs. Delaware L. & W. R. Co. 229 U. S. 146, 152, 57 L. Ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C., 153, 3 N. C. C. A. 779; New York C. & H. R. R. Co. vs. Carr, 238 U. S. 260, 263, 59 L. Ed. 1298, 1299, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Pennsylvania Co. vs. Donat, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. Rep. 4; Louisville & N. R. Co. V. Parker, 242 U. S. 13, ante, 119, 37 Sup. Ct. Rep. 4. Pederson vs. Delaware, L. & W. R. R. Co. supra, holds that a workman

employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act.

Of course we attribute no significance to the fact that plaintiff had been engaged in inspecting interstate cars before he was called aside by the occurrence of the collission. Illinois C. R. Co. vs. Behrens 233 U.S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C., 163, 10 N. C. C. A. 153; Erie R. Co. vs. Welsh, 242 U. S. 303, 306, ante, 319, 324, 37 Sup. Ct. Rep. 116."

Southern R. Co. vs. Puckett, 244 U. S. 571, 573, 574, 61 L. Ed. 1321, 1324, 1325.

The case at bar would parallel the New York C. R. Co. vs. White, 243 U. S. 188, 61 L. Ed. 667 if that were not a new construction case, which takes it out of the Federal Act.

(Pederson vs. Del. L. & W. Rrd. Co. supra, page 1128 of L. Ed. 12 C. J. page 48 and note 41, and 41 A. and cases there cited . Note to Seaboard A. L. R. Co. vs. Horton, 1915, C. (L. R. A.) 1, 63.)

In this case a night watchman in the employ of a railway company, injured while in the performance of his duties to guard tools and materials intended to be used in the construction of a *new* railway station and *new* tracks, was held not then engaged in interstate commerce within the meaning of the Federal Liability Act, although such station and tracks were designed for use, when finished, in interstate commerce, the inference being that if he had been guarding tools used in *repairing* a railway station and tracks then in use in interstate commerce he would have been engaged in interstate commerce within the meaning of the Act.

4.

The authorities usually relied on to take a case out of the Federal act are:

Minn. & St. L. R. Co. vs. Winters, 242 U. S. 353, 61 L. Ed. 358.

Chicago B. & A. Co. vs. Harrington, 241 U. S. 177, 60 L. Ed. 941.

Shanks vs. Del. L. & W. R. Co., 239 U. S. 556, 60 L. Ed. 436, 1916 C. (L. R. A.,) page 797.

Del. L. & W. R. Co. vs. Yurkonis 238 U. S. 439, 59 L. Ed. 1397.

Ill. C. Rrd. Co. vs. Behrens 238 U. S. 473, 58 L. Ed. 1051, Ann. Cas. 1914, C., 163.

In the winters case a machinist's helper was injured while repairing in a roundhouse an engine which had been used in both interstate and intrastate commerce and which was used in the same way after the accident. The Court says on page 359 and 360 of the L. Ed.:

> "This is not like the matter of repairs upon a road permanently devoted to commerce among the states" * * * * * * "It was not interupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or *confined to Iowa*, as it should happen. (Italics mine.)

In the Harrington case the deceased was a member of a switching crew which did not work outside of the State. The gang was engaged at the time of the accident in switching coal belonging to the defendant which had been standing on a storage track for sometime, to the coal shed where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, "some of which were engaged or about to be engaged in interstate and others in intrastate traffic" * * * * 'With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the company, and 'had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.' "

In the Shanks case the Court, on page 799 of the L. Ed., referring to the plaintiff, says:

"Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead countershaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work."

In theYurkonis case the plaintiff was mining coal in the colliery of the defendant. The Court says, page 1400 of the L. Ed. :

"The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce,—facts essential to recovery under the employer's liability act."

In the Behrens case a member of a switching crew, whose general work extended both to interstate and intrastate traffic, was engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another.

Had the respondent in the case at bar been employed to prepare the meals for the company's bridge carpenters at some place removed from the prosecutor's interstate lines, which meals were carried by another servant of the prosecutor to the camp car, or had there been two gangs of men for whom to prepare meals, one gang employed in interstate commerce and the other gang ememployed in intrastate commerce, it not appearing from the evidence for which gang the respondent was preparing dinner at the time of the accident, the case at bar

might parallel these cases.

5.

Cases holding the servant within the act decided by Federal Courts other than the Supreme Court of the United States and by State Courts. Some of these cases have been cited with approval by the Supreme Court—none have been reversed, or disapproved of, by the Supreme Court.

A railroad fireman, who, in accordance with his contract, was obeying an order to report at a station for transportation to a certain town, there to relieve the crew of an interstate train, is employed in interstate commerce within the meaning of the Federal Employer's Liability Act, and the railroad company is liable for his negligent killing by fellow servants also engaged in interstate commerce, while he was crossing the track at the station where he was ordered to report.

Lamphere vs. Oregon R. & Nav. Co., 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1.

(Cited with approval in Pederson vs. Del. L. & W. R. Co. 229 U. S. 146, 57 L. Ed. 1125, 1128.)

An operator of a railroad pumping plant which furnishes water for interstate engines, is employed in interstate commerce while riding from his home to his work on a handcar, furnished by the company for that purpose, so as to be within the operation of the Federal Employers' Liability Act, if injured by those, during that time, in charge of an interstate train.

Horton, etc., vs. Oregon W. R. & Nav. Co., 72 Wash. 503, 132 P. 897, 47 L. R. A. (N. S.) 8.

(Cited with approval in Pederson vs. Del. L. & W. R. Co. supra, 229 U. S. 146, 57 L. Ed. 1125, 1128.)

A fireman on a switch engine, in moving cars of water or coal over the line of his employer, an interstate railroad, for use in its own engines, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

Barker vs. Kan. City M. & O. Co., 88 Kan. 767, 129 P. 1151, 43 L. R. A. (N. S.) 1121.

A member of a switching crew injured while attempting to move on a switch a tank car loaded with oil for engines running between states, as well as for his own, which is engaged in moving cars between switches and the main track where they are left and taken up by interstate trains for transportation into other states as well as to points within the state where he is located, is, although his duties are all performed in one state, employed in interstate commerce within the operation of the Federal Employers' Liability Act.

Montgomery vs. Southern P. Co. 64 Or. 597, 131 P. 507, 47 L. R. A. (N. S.) 13.

A boiler makers' helper engaged in repairing a locomotive regularly employed in interstate transportation and which was destined to return thereto upon completion of repairs, is employed in interstate commerce and within the protection of the Federal Employers' Liability Act.

Law vs. Ill. C. R. Co. ,126 C. C. A. 27, 208 Fed. 869, 1915 C. (L. R. A.) 17. (This case is distinguished from Minn. & St. L. R. Co. vs. Winters, supra, because the locomotive had been and was to be engaged exclusively in interstate commerce.)

Station agents when handling interstate traffic.
Thornton (1916) Federal and Safety Appliance Acts, page 94.

A person injured while engaged in the work of installing a new automatic block system is employed in interstate commerce at the time of his injury.
Saunders vs. Southern R. Co. 167 N. C. 375, 83 S. E. 573.

An employee engaged in building a new office in an old train shed.
Eng. vs. Southern P. Co. 210 Fed. 92.

A truckman employed by a railroad company to wheel interstate freight from a warehouse into a car to be transported in interstate commerce is engaged in interstate commerce.

Ill. C. R. Co. vs. Porter, 125 C. C. A. 55, 207 Fed. 311.

One employed in cleaning out ash pits into which ashes from both interstate and intrastate locomotives are dumped is engaged in interstate commerce.

Cinn. N. O. & T. R. Co. vs. Clark, 169 Ky. 662, 185 S. W. 94.

Gryboski vs. Erie R. Co. 88 N. J. Law 1, 95 A. 764.

Signal man operating electric signals which control the operation of interstate trains.

Cinn. etc., R. Co. vs. Bonham, 130 Tenn. 435, 171 S. W. 79.

Hostler's helper engaged in coaling engine then being prepared for interstate service.

Armbruster vs. Chicago R. Co. 166 Iowa, 155, 147 N. W. 337.

Carrying material away from place where repair work has been done.

Philadelphia etc., R. Co., vs. McConnell, 228 Fed. 263, 142 C. C. A. 555.

"A person engaged in repairing the tracks of a railroad company is engaged in interstate commerce, even though the repairs consist in shoveling the dirt from between the ties under the rails of the tracks used to carry interstate trains."

Lombardo vs. Boston, etc., R. Co. 223 Fed. 427, 432.

An employee returning to camp on a hand car from his work, which was ballisting the main track of a railroad which carried freight and passengers between different States. "Although at the time when he was injured he was returning to the camp at the conclusion

of his day's labor he was doing so at the direction of his employer. He got upon the hand car upon which he rode under the order of the section foreman, to take it back to a certain designated place on the line of the road."

San Pedro, L. A. & S. L. R. Co. vs. Davide, 210 Fed. 870, 127 C. C. A. 454.

Section man engaged in sweeping snow from the switch connected with the main track near to a station.

Hardwich vs. Wabash R. Co. 181 Mo. A. 156, 168 S. W. 328.

An express messenger on an interstate train in charge of the electric plant in the express car, the plaintiff was held to be engaged in interstate commerce, although the Court says:

"There is no evidence that the train had, at the time of the injury, interstate freight or passengers, that the Express Company then had interstate shipments, or that the train was carrying interstate passengers, whom Wessler could be serving by turning on, as he said he was then doing, the electric current to illuminate the train. On the other hand, there is no testimony that there was no interstate freight, express shipments, or passengers."

Wessler vs. Great N. R. Co. 91 Wash. 234, 155 P. 1063, 157 P. 46.

Where an employer who was engaged in relaying rails on the main track, forming one of a repair crew, was injured while asleep at night in a shanty car in a train on a side track, a car provided by the railroad company for the crew, it was held that he came within the Federal Act.

Sanders vs. Charleston & W. C. R. R. Co., 96 S. C. 50, 81 S. E. 283.

A porter preparing ice to put in a water cooler on the train for the use of interstate passengers. "He

(plaintiff) alleged that while in the employ of said receiver in the city of Fort Worth he was attempting to lift a block of ice, weighing about one hundred pounds from an ice box, for the purpose of carrying same to passenger cars and that while engaged in the effort he slipped and was injured by a falling block of ice" • • • • that it was a part of his duty "to go to the roundhouse, get ice from the boxes furnished for that purpose, place it on a table, and saw in into four pieces, put the pieces in a wheel-barrow, convey them to passenger coaches, and put them in water coolers."

Quoting from the Court's opinion:

"Appellee's employment had direct relation to the commerce, to-wit: the two interstate passengers which the train in question transported. The service performed directly contributed to the comfort and necessity, not only of the local, but of the interstate passengers."

Freeman vs. Powell (Tex. Civ. A.) 133 S. W. 1033, Thornton, Federal and Safety Appliance Acts, (1916) p. 96.

6

One case from the United States Circuit Court of Appeals, and two cases from the Supreme Court of the United States, which seem to be in point, not only in principle, but in identity (with the case at bar) of the kind of work embraced within the scope of the Federal Employers' Liability Act;

A pullman porter is, as to the railroad, engaged in interstate commerce, when he is an employee of the Railroad Company.

Oliver vs. N. P. R. Co., 196 Fed. 432.
Thornton, Federal and Safety Appliance Acts, (1916) p. 127, note 2.

This would be the ruling of the Supreme Court were a case like the Oliver case presented. In the case of Robinson vs. B. & O. R. Co. 237, U. S. 84, 59. L. Ed. 849,

recovery was denied because of the contract between Robinson, a pullman porter, and the railroad company exempting it from liability. Robinson attempted to invoke the Federal Employers' Liability Act which says that such a contract shall be void. It seemed to have been conceded that if Robinson had been a servant of the railroad company he would have been engaged in interstate commerce within the meaning of the act, but the Supreme Court held he was not an employee of the railroad company. On page 852 of the L. Ed. The Supreme Court says:

> "The contract between the Pullman Company and the Railroad Company was introduced in evidence. Without attempting to state its details, it is sufficient to say that the case was not one of co-proprietorship. (See Oliver vs. Northern P. R. Co., 196 Fed. 432, 435.")

In Johnson vs. Southern P. Co. 106 U. S. 1, 21, 49 L. Ed. 363, 371, the Supreme Court held that a dining car was engaged in interstate commerce:

> "Another ground on which the decision of the circuit court of appeals was rested remains to be noticed. That court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it came along that evening." • • •
>
> "Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up

for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

This case is cited repeatedly in cases in which the Federal Employers' Liability Act has been invoked.

B. & O. R. R. Co vs. Darr, 204 Fed. 751, 47 L. R. A. 4, 6.

Pederson vs. Del. L. & W. R. Co. 229 U. S. 146, 57 L. Ed. 1125.

St. Louis S. F. & T. R. Co. vs. Seale, 229 U. S. 156, 57 L. Ed. 1129.

N. C. Rrd. Co. vs. Zachary 232 U. S. 248, 58 L. Ed. 591.

If a dining car, attached to an interstate train, is engaged in interstate commerce, then clearly a waiter or *cook* on a dining car, being the employees, the performance of whose duties make it possible for the dining car to perform the only functions which it is to perform, are engaged in interstate commerce. I have found it impossible to distinguish between the case of a cook on a dining car and that of the respondent in the case at bar.

Respectfully submitted,

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